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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 437

G. A. ROSCHEK, *Petitioner,*

vs.

STELLA E. WILLIAMSON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

G. A. ROSCHEK,
By ELI F. SEEBIRT and
ORLO R. DEAHL,
Counsel for said Petitioner.

SEEBIRT, OARE & DEAHL,
Of Counsel for
G. A. Roschek, the Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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Argument:

I. The decision of the Circuit Court of Appeals that liability does not attach, as a matter of law, to the record transferee of National bank stock where the transferee was without original knowledge of the transfer but subsequently accepts and appropriates dividend checks therefrom, made payable to the transferee and drawn by and upon the National Bank, with knowledge or a patent opportunity for knowledge that the dividends resulted from the stock in question probably conflicts with a decision of this court 11

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.....

G. A. ROSCHEK,

Petitioner,

against

STELLA E. WILLIAMSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This action was brought November 14, 1939, in the District Court of the United States for the Northern District of Indiana, South Bend Division, by the Receiver of the New Albany National Bank of New Albany, Indiana, against the respondent for an assessment levied by the Comptroller of the Currency of the United States on four-

teen and one-fourth (14¼) shares of the stock of said bank standing in the name of the respondent upon which assessment the sum of $309.64 previously had been paid. Before trial the Receiver sold and transferred the chose in action to the petitioner herein and he was substituted as plaintiff. Trial was had before a jury which returned a verdict for respondent.

The New Albany National Bank was organized as a National Banking Association pursuant to the Acts of Congress. On the 23rd day of March, 1934, the Comptroller of Currency made a finding that said bank was insolvent and appointed a receiver (R. p. 12). The Comptroller duly levied an assessment on the stock for the par value of every share, payable on or before July 1, 1934 (R. p. 13).

On and prior to February 10, 1930, one Arthur B. Williamson was the owner of 14¼ shares of the stock of said bank of the par value of $100 per share. On January 14, 1930, Arthur B. Williamson disappeared and was not heard of until February 26, 1930, when he was found dead in the St. Joseph River. Arthur B. Williamson was the husband of the respondent (R. p. 13).

The stockholders' register of said bank shows that on February 10, 1930, the stock certificate standing in the name of Arthur B. Williamson was cancelled and a new certificate for the same number of shares was issued in the name of respondent (R. p. 13). The records of the bank show that said transfer was made pursuant to power of attorney signed in blank by A. B. Williamson in the presence of George Borgerding, A. B. Williamson being the same person as Arthur B. Williamson. The new stock certificate issued in the name of respondent was receipted for on February 10th, by "Stella E. Williamson by George Borgerding" (R. p. 14). George Borgerding was the father of respondent, Stella E. Williamson (R. p. 15).

On June 30, 1930, the bank declared a dividend of $5.00 per share on each of the shares outstanding as dividend No. 121. Pursuant to said declaration, the bank issued its check payable to Stella E. Williamson in the sum of $71.25, which check was on July 1, 1930, endorsed by her and presented at the Citizens National Bank of South Bend, Indiana (R. p. 15).

On December 31, 1930, said bank again declared a dividend of $5.00 per share on its capital stock, known as dividend No. 122, and pursuant to said declaration the bank issued its check payable to Stella E. Williamson in the sum of $71.25. This check was on January 3, 1931, duly endorsed by respondent and presented by her at the Citizens National Bank of South Bend (R. p. 15).

The first check issued by the New Albany National Bank had in the left-hand margin a notation as follows: "Dividend No. 121". The second check also had a marginal notation as follows: "Dividend No. 122" (R. p. 63).

In the summer of 1939 the Receiver of the New Albany National Bank made a demand upon respondent for the amount of the assessment on the 14¼ shares and on June 26, 1939, mailed a letter to respondent which was duly received (R. p. 16). The letter set forth that the bank records showed that respondent exercised ownership of the stock and had twice received dividends, in the amount of $71.25 each, and made a demand for the payment of the assessment (R. p. 64).

The respondent individually made no payment on the stock assessment (R. p. 16) but respondent, as administratrix of the estate of Arthur B. Williamson, paid the sum of $309.64 from the estate of Arthur B. Williamson, deceased (R. p. 17). The Receiver gave a notice against the shareholders and addressed a notice to Arthur B. Williamson and upon filing a claim in the estate of Arthur B. Wil-

liamson the administratrix allowed such claim in the court in which the estate was pending. The estate was closed as insolvent and there was paid to the Receiver the sum of $309.64 which was a pro rata share of the assets of said estate. The estate of Arthur B. Williamson was closed. The receiver applied the said $309.64 to the assessment (R. p. 17).

In the probate proceedings on the estate of Arthur B. Williamson no sale of the stock was authorized by the court and the stock was not distributed (R. p. 17). The inventory filed in the court of probate jurisdiction did not list said stock (R. p. 43). The stock had value at the time of Mr. Williamson's death and in the final report the dividends received upon the stock by respondent were not listed (R. p. 44).

Respondent, a witness in her own behalf, denied that she ever had the stock certificate which was issued in her name in her possession (R. p. 25); that she was ever informed by any one that the books of the bank disclosed that she was a stockholder; that she ever received any notice from the secretary of the bank of a stockholders' meeting; that she ever authorized her father to give a receipt for any stock at the bank (R. p. 26). She also said that as administratrix she didn't transfer any stock of the said bank and signed no petition requesting an order for the transfer of the stock and that the same was not transferred in the estate to any of the heirs or distributees (R. p. 27).

Respondent also said that she did not recall receiving a check for the sum of $71.25 from the New Albany National Bank sometime in June or July of 1930. And then when asked whether she recalled receiving a check around December 31, 1930 answered, "I hardly recall it". She further stated that the demands made on the stock liability prior to 1939 were made against the estate of Arthur B. Williamson (R. p. 28).

Respondent also said that she knew that her husband had a certificate of stock representing 14¼ shares in the New Albany National Bank prior to his death; that she did not recall that she made any inquiry about the stock after his death. When asked whether she made any inquiry as to the certificate of stock after her husband's demise, she answered, "No; I knew I had it; I knew he had it", but said she did not recall that she made any attempt to locate it. She stated further that she did not recall endorsing the checks for dividends; that she was too grieved at the time to worry over such things (R. p. 29).

Respondent stated that she did not have any other stock at New Albany on which she could get a dividend. She further asserted that she did not have any stock whatsoever and she supposed that if she received a dividend at all it would be a dividend on the New Albany National Bank.

Respondent stipulated that the dividend checks were duly endorsed by her and presented to the Citizens National Bank (R. p. 16).

Respondent signed and caused to be filed the final report in the administration of her husband's estate without giving any consideration to whether she received dividends on the stock (R. p. 34). She filed a claim against her husband's estate in the amount of $1,204.21 (R. p. 37).

She said that she probably saw her name on the dividend checks but that she does not recall (R. p. 38).

Arthur B. Williamson had a loan with St. Joseph Bank and Trust Company in 1930 and used the stock certificate then in his name as collateral security. After the death of Arthur B. Williamson the note was paid (R. p. 39). The respondent's attorney herein testified that at the request of Mr. Borgerding, the father of the respondent, and with a draft sent by the father of the respondent, he paid the note

at the St. Joseph Bank and Trust Company and sent the note to Mr. Borgerding (R. p. 43). The witness received the stock.

The witness, as attorney for the estate of Mr. Williamson, prepared the final report. He also prepared the inventory and appraisement for the defendant to sign. The inventory and appraisement was filed in 1934 after the bank ceased to do business and the stock was not included in the inventory and appraisement (R. p. 43). The attorney presumed that the stock had value at the time of Mr. Williamson's death but assumed that since it had no value at the time of the filing of the inventory and appraisement, it was not necessary to list it. He knew, however, that the bank was operating at the time of Mr. Williamson's death. He further stated that he did not list the dividends in the final report because he didn't know that any dividends had been received (R. p. 45). He stated that if he had known that she received dividends on the stock he would not have listed them as an asset under the circumstances as he would have offset the same against debts of the decedent paid by the widow from her own funds (R. p. 46).

II.

Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because:

1. The date of the judgment and opinion of the Circuit Court of Appeals for the Seventh Circuit to be reviewed is May 5, 1944 (R. p. 82). Petition for rehearing was duly filed and rehearing was denied June 6, 1944 (R. p. 87).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat.

938, Sect. 1; 28 U. S. C. A. 347) which admits of a writ of certiorari to review a final judgment of the Circuit Court of Appeals for the Seventh Circuit.

3. It is manifest from the record and the foregoing summary statement that this cause is based upon an asserted liability arising under the laws of the United States governing national banking associations.

The question presented, as hereinafter set forth, is substantial in that it is believed the decision herein of the Circuit Court of Appeals for the Seventh Circuit is contrary to the governing rule of law established by this Court in the case of *Keyser* v. *Hitz*, 133 U. S. 138, and that, if the decision herein be permitted to stand without clarifying review, confusion and uncertainty will result in the application of controlling concepts in respect of superadded liability of stockholders in national banking associations.

4. The cases believed to sustain the jurisdiction of this Court are as follows:

Inland Waterways Corp., et al., v. *Frederick J. Young, Rec.* (1940), 309 U. S. 517.

J. Buckner Fisher, Rec. v. *Louise Whiton, Exrx.* (1942), 317 U. S. 217.

Maricopa County, Arizona v. *Valley National Bank of Phoenix* (1943), 318 U. S. 357.

III.

Question Presented.

The sole question presented is: Whether or not where stock of a national banking association stands in the name of a given person, even though the stock shall have been transferred into the name of such person without prior authority or knowledge, such person is answerable for superadded liability thereon as a matter of law if, after the transfer, dividend checks drawn by and upon such

association and made payable to such person are endorsed and cashed by such person with knowledge or a patent opportunity for knowledge that such dividends resulted from the stock in question.

IV.

Reasons Relied Upon for Allowance of the Writ.

1. The decision herein of the Circuit Court of Appeals for the Seventh Circuit has determined a federal question in a way probably in conflict with the applicable decision of this Court in the case of *Keyser* v. *Hitz*, 133 U. S. 138.

V.

Your petitioner presents to and contemporaneously files with this Court adequate copies of a duly certified transcript of this case, as the same appears in the United States Circuit Court of Appeals for the Seventh Circuit.

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment herein of the Circuit Court of Appeals be reversed; and for such further relief as to this Court may seem proper.

G. A. ROSCHEK,

Petitioner.

By ELI F. SEEBIRT,
ORLO R. DEAHL,
Counsel for Petitioner.

SEEBIRT, OARE & DEAHL,
Of Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

G. A. ROSCHEK,

Petitioner,

vs.

STELLA E. WILLIAMSON,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion of the Court Below.

The opinion herein of the Circuit Court of Appeals for the Seventh Circuit is reported in 142 F. (2d) 542 (Advance sheet No. 4). The same is likewise set forth in full in the record herewith (R. p. 82).

Statement of Jurisdiction.

A full statement respecting the asserted jurisdiction of this Court is set forth in the preceding Petition for Writ of Certiorari under topic II, which statement is made a part of this brief by reference.

Concise Statement of the Record.

This has already been stated in the preceding Petition under topic I and is made a part of this brief by reference.

Specifications of Error.

1. The Circuit Court of Appeals committed error herein by its affirmation and approval of the action of the trial court in refusing peremptorily to instruct the jury, at petitioner's request and at the close of all the evidence, to return a verdict for petitioner.

2. The incontroverted evidence established respondent's liability as a matter of law and the Circuit Court of Appeals indulged error in failing to give recognition to this rule as established by previous decision of this Court.

Summary of Argument.

I. The decision of the Circuit Court of Appeals that liability does not attach, as a Matter of law, to the Record Transferee of National bank stock where the Transferee was without original knowledge of the transfer but subsequently accepts and appropriates dividend checks therefrom, made payable to the Transferee and drawn by and upon the National Bank, with knowledge or a patent opportunity for knowledge that the dividends resulted from the stock in question probably conflicts with a decision of this Court.

II. Ultimate facts in the case at bar, established either by stipulation or incontroverted evidence, make for liability under the formula of *Keyser* v. *Hitz*.

ARGUMENT.

Point I.

The Decision of the Circuit Court of Appeals That Liability Does Not Attach, as a Matter of Law, to the Record Transferee of National Bank Stock Where the Tranferee Was Without Original Knowledge of the Transfer But Subsequently Accepts and Appropriates Dividend Checks Therefrom, Made Payable to the Transferee and Drawn By and Upon the National Bank, With Knowledge Or a Patent Opportunity For Knowledge That the Dividends Resulted From the Stock in Question Probably Conflicts With a Decision of This Court.

We regard the case of *Keyser* v. *Hitz*, 133 U. S. 138, as the controlling authority in support of the foregoing assertion of law. In that case, stock was placed in the name of Mrs. Hitz by her husband. It was not distinctly shown by the evidence that the stock certificates were ever in her possession. It was shown, however, that Mrs. Hitz had endorsed dividend checks to her husband. Mrs. Hitz claimed that she never bought, owned, or voted any of the bank stock and never knew, until after the failure of the bank, that her name appeared among the stockholders on the books of the bank; that she never received any dividend paid and never received any certificates of stock. She denied seeing the checks for the dividends but was unable to deny that the signatures endorsed upon the checks constituted her signature.

The dividend check read as follows:

> "Pay to Jane C. Hitz or order $800.00, fourth dividend payable this day on stock standing in her name on the books of the bank and charged to dividend account No. 3300."

Upon these facts, this Court announced those propositions of law bespoken in the three following quotations from the opinion:

> "If she became aware of the transfers, after they were made, and thereafter received the dividends, she became a shareholder for all purposes of individual liability in respect to the contracts, debts and engagements of the bank, as fully as if the transfers had been made originally with her knowledge and consent. Whether she received the dividends or not depended upon the inquiry as to whether the checks for them were endorsed by her. If she endorsed them, or either of them, she is estopped to say she did not know their contents, and was not the owner of the shares of stock upon which the dividends were declared; for each check discloses upon its face that it was payable to her order, and was for dividends on stock standing in her name on the books of the bank."
>
> * * * * *
>
> "But if, after the transfers, she * * * in any * * * mode approved, ratified or acquiesced in such transfers or accepted any of the benefits arising from the ownership of the stock thus put in her name on the books of the bank she was liable to be treated as a shareholder with such responsibility as the law imposes upon the shareholders of National banks."
>
> * * * * *
>
> "It is sufficient on this point to say that the record made of the transfers upon the books of the bank was sufficient, as between her and the bank, to work a change of ownership, and new certificates were not necessary to her becoming the owner of the stock so transferred."

By the foregoing assertions, this Court recognized that dividends, as the produce of invested capital, are a fundamental incident and a primary objective of stock ownership. The acceptance and appropriation of stock dividends is consonant only with the relationship which arises from

the ownership of the stock upon which the dividend is declared. It is inconsistent with any other or different relationship to the issuing corporation. One cannot accept the benefits of stock ownership and disavow the burdens thereof.

The precise difference of opinion in the case at bar between the Circuit Court of Appeals and Petitioner resides in the fact that the Circuit Court of Appeals, as disclosed by its opinion, believes the case of *Kyser* v. *Hitz, supra,* to be applicable only where the face of the dividend check affirmatively states that it is issued "for stock standing in the name of respondent on the books of the bank". Thus, the Circuit Court of Appeals delimits the operative ambit of the case of *Keyser* v. *Hitz* to an instance in which *all* of the salient facts are reflected on the face of the dividend check itself. Petitioner disagrees, believing that *Keyser* v. *Hitz* established a broader principle of law, namely, that the person to be held liable must have had knowledge, information or patent access thereto, either from the face of the check or otherwise, which extended knowledge or a ready opportunity for knowledge that the stock stood in the name of such person.

The foregoing second paragraph of quotation from the opinion in *Keyser* v. *Hitz,* as we believe, sustains petitioner's contention for a broader application of its precepts than that accorded by the Circuit Court of Appeals . This Court said that "if, after the transfers, she * * * *in any* * * * *mode* approved, ratified or acquiesced in such transfers * * *" liability would attach.

Petitioner further feels justified in construing *Keyser* v. *Hitz* as authority for sustaining liability not along where there is subsequently acquired actual knowledge that stock has been transferred to the name of the person asserted as liable but also where such person had a patent oppor-

tunity for knowledge. Mrs. Hitz expressly denied having actual knowledge that the stock stood in her name and denied having seen the dividend checks. Thus this Court predicated liability on the basis that she had a ready access to knowledge through that which appeared on the checks.

Point II.

Ultimate Facts in the Case at Bar, Established Either By Stipulation or Incontroverted Evidence, Make For Liability Under the Formula of Keyser v. Hitz, Supra.

If, as petitioner believes, the case of *Keyser* v. *Hitz*, *supra*, establishes the proposition of law asserted at Point I of this brief, the sole remaining question is whether or not the requisite elements of liability as set forth therein were established by stipulation or undisputed evidence in this case. If those elements were so established, there was no question of fact to be resolved by the jury and a binding instruction should have issued from the trial court at petitioner's request.

That the stock in the case at bar stood in the name of respondent on the books of the corporation was stipulated (R. p. 13). It likewise was stipulated that respondent receiver, endorsed and cashed two dividend checks, each showing upon its face that it was a dividend check, drawn to the order of respondent by and upon the banking corporation which declared those dividends (R. p. 15, p. 63). Respondent testified that she had no other stock of any kind from which the dividends could have been derived (R. p. 30). Respondent further testified that she supposed that if she received a dividend at all it would be a dividend on the bank whose stock is here involved (R. p. 30). These facts are undisputed and are free of contrary evidence. Therefore, the jury had no issue of fact to try upon these points.

If the undisputed facts above stated fall within the rule as laid down by the Keyser case, and we sincerely believe those incontroverted facts establish every element of that rule, respondent was liable as a matter of law. That it is the inescapable duty of the trial court to issue a peremptory instruction where the incontroverted evidence establishes liability as a matter of law is so fundamental a rule that the citation of supporting authority is unnecessary.

In both the case of *Keyser* v. *Hitz* and in the present matter, the marginal notations on the dividend checks affirmatively disclosed that they were in fact dividend checks. The checks in *Keyser* v. *Hitz* however, also disclosed that they were issued on stock of the bank standing in the name of Mrs. Hitz. That fact did not appear on the checks here in issue but the same fact was disclosed or made readily accessible to respondent from other sources, namely, the face of the checks themselves, coupled with her extraneous, admitted personal knowledge. These checks were drawn *by and upon* the New Albany National Bank as dividend checks and so labeled. Therefore, she knew or could have known that they were dividend checks and had some nexus with that bank. Respondent admitted that she had no other stock in any corporation and, further, that she supposed that if she received a dividend at all (it was stipulated New Albany National Bank. We feel these undisputed facts conveyed to respondent a knowledge as full and complete as that which was conveyed to Mrs. Hitz by the legend on the latter's dividend check.

There are but two persons who could have owned this stock, namely, the respondent or her deceased husband. It is the contention of respondent that this stock was owned by her deceased husband and that she was without ownership thereof at any time. The undisputed evidence is that respondent was administratrix of the estate of her deceased

husband and that in the administration of his estate she filed verified inventory and final accounting. The undisputed evidence further reveals that neither the inventory nor the final accounting takes cognizance of the stock in question or its dividend accretions. If this stock was owned by the deceased husband, as respondent contends, it was the clear duty of respondent, as administratrix, to inventory and account for the stock and account also for the dividends. The probate code of Indiana, Burns' Indiana Statutes of 1933, Section 6-701, in essence provides that an administrator shall make out a true and complete inventory of the personal estate of the decedent which shall have come to his knowledge, including all debts, demands, stocks, moneys and goods, "due to and owned by the decedent at his death."

The only explanation tendered by respondent for her failure to inventory this stock was the explanation of her attorney herein (who also was attorney for the estate of her husband) that the stock was valueless at the time of the preparation of the inventory. With all respect to the opinion and testimony of the learned counsel for respondent, we submit that the Indiana statute requires the inclusion in the inventory of all stock owned by the decedent at his death. Clearly, this stock had value at the time of the demise of respondent's husband. Moreover, it is not for the administratrix or her attorney to determine whether the stock had value as the statute contemplates the appointment of disinterested appraisers for that very purpose. Therefore, we believe that the tendered excuse is feeble and ill-founded.

The only explanation tendered with respect of respondent's failure, as administratrix, to account for the dividends received in respect of this stock was the assumption by respondent's attorney that it might have been offset against

debts of the decedent paid by the respondent from her own funds. This does not seem probable in that respondent filed her claim in the estate and, presumably, filed that claim to cover all obligations owing her. Secondly, the estate was settled as insolvent and it is not to be presumed that defendant extracted moneys of the estate to prefer herself over remaining creditors of the estate. The Indiana Probate Code, Burns' Indiana Statutes of 1933, Sec. 6-1401, requires that an administrator include in the final report all income derived from the property of the estate. Therefore, the only sound inference arising from these failures is that the respondent did not consider this stock or the income therefrom derived to have been the property of the estate of her deceased husband. By signing the sworn inventory and final account in the estate of her deceased husband from which said stock was omitted, the defendant acquiesced in and ratified her ownership of this stock. *In re Smith's Estate*, 282 Mich. 566, 276 N. W. 554, p. 557.

Conclusion.

It, therefore, is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision herein of the Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

G. A. Roschek,

By Eli F. Seebirt,

Orlo R. Deahl,

Counsel for Petitioner.

Seebirt, Oare & Deahl,

Of Counsel for Petitioner.

(16)

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G. A. ROSCHEK,

Petitioner,

vs.

STELLA E. WILLIAMSON,

Respondent.

OPPOSING BRIEF OF RESPONDENT.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 437.

G. A. ROSCHEK,

Petitioner,

vs.

STELLA E. WILLIAMSON,

Respondent.

OPPOSING BRIEF OF RESPONDENT.

I.

STATEMENT OF THE CASE.

The petitioner in his concise statement of the record, has referred to the statement contained in the Petition for Certiorari, under I, entitled "Summary Statement of the Matter Involved" but the petitioner has overlooked the following facts disclosed by the record:

1. Mrs. Williamson, the respondent, testified she did not recall receiving the dividend check dated December 31, 1930 (R. p. 30).

2. The petitioner has failed to set forth a copy of the receipt and settlement executed by the Receiver of the New Albany National Bank (R. p. 18) a copy of which receipt is marked Defendant's Exhibit A, and is in the words and figures following (R. p. 68):

Defendant's Exhibit A.

STATE OF INDIANA, }
ST. JOSEPH COUNTY. } SS.

IN THE ST. JOSEPH CIRCUIT COURT.

In the Matter of the Estate of Arthur Butler Williamson, Deceased.

RECEIPT OF FULL AND FINAL DISTRIBUTIVE SHARE IN THE SETTLEMENT OF SAID ESTATE AS INSOLVENT.

The undersigned, the duly appointed and presently acting receiver of the New Albany National Bank, hereby acknowledges receipt of the sum of Three Hundred Nine and 64/100 Dollars ($309.64) being 21.729% of the surplus distributable to the general creditors of the estate of Arthur B. Williamson, also known as Arthur Butler Williamson, which estate, under the order of the St. Joseph Circuit Court, is being settled as an insolvent estate, and the aforesaid amount is received in full settlement of the claim filed by the receiver against said estate on an assessment of Fourteen Hundred Twenty-five Dollars ($1425.00).

Dated at New Albany, Indiana, this 25th day of January, 1937.

CHARLES DAVIDSON,
Charles Davidson,
Receiver, New Albany National Bank.

II.

JURISDICTIONAL STATEMENT.

The jurisdictional statement made by the petitioner under Clause 3 thereof, states, in substance, that the question presented is substantial and that if the decision is permitted to stand "confusion and uncertainty will result in the application of controlling concepts in respect of superadded liability of stockholders in national banking associations."

We submit that liability has now ceased, except only in a very few banking institutions which have not given notice pursuant to Title 12, Sec. 64a, F. C. A., being an act of June 16, 1933, C. 89, Sec. 22; 48 Stat. 189; Aug. 23, 1935, C. 614, Tit. III, Sec. 304; 49 Stat. 708.

This case likewise is controlled by the case of *Williams* v. *Vreeland*, 250 U. S. 295, 63 L. Ed. 989, which holds, in substance, that the question involved in this case as to respondent's liability is a question of fact to be determined by a jury.

ARGUMENT.

POINT I.

The Decision of the Circuit Court of Appeals as a Matter of Law Is Correct.

Petitioner relies entirely in this case upon the authority of *Keyser* v. *Hitz*, 133 U. S. 138. The argument of petitioner, however, fully distinguishes the case at bar from the case cited. In the case before this Court the respondent, Mrs. Williamson, never had any knowledge that the stock in question stood in her name on the books of the bank. Even the receiver and his successor, with the stock records in their possession, determined she was not the owner, but that the deceased, Arthur B. Williamson, was the owner. The checks allegedly cashed did not disclose, upon their fact, as in the case cited, that they were dividend checks on stock standing in respondent's name.

The language of the opinion cited by the petitioner does not bear out the theory advanced. On page 12 of petitioner's brief the first words of the quotation from *Keyser* v. *Hitz* clearly show the fallacy of petitioner—"*If she became aware of the transfers, after they were made*, and thereafter received the dividends * * *." Petitioner has pointed to no evidence that Mrs. Williamson, the respondent, ever became aware of the transfers. The record is to the contrary.

Petitioner seeks to give a much broader meaning to the decision of *Keyser* v. *Hitz*, 113 U. S. 138, 10 S. Ct. 290, 33 L. Ed. 531, than is warranted by the language of that opinion. The petitioner states in substance that the case

holds that the person against whom liability is asserted must have knowledge or information *or a patent opportunity for knowledge* that bank stock stood in the name of such person. The Supreme Court in that case clearly stated: "If she becomes aware of the transfers, after they were made, and thereafter received the dividends she became a shareholder."

There is not a word in the case as to a patent opportunity for knowledge. There is not a word in the evidence in the case at bar that Mrs. Williamson ever became aware of the purported transfers after they were made.

This case is controlled by the case of *Williams* v. *Freeland*, 250 U. S. 295, 63 L. Ed. 989, which holds that the question of whether or not a person "dealt with the stock in a manner which would have furnished her this knowledge, *were issues of fact properly left to the jury.*"

Point II.

The Ultimate Facts Disclose That the Plaintiff Was Not Entitled to Recover.

Petitioner's Point II depends entirely upon the hypothesis that his argument under Point I is well founded. We submit it is not and therefore there is no basis for a consideration of this point.

The case of *In re Smith's Estate*, 282 Mich. 566, 276 N. W. 554, cited by petitioner, is not in point. The stock was there owned jointly by husband and wife. On the death of the husband the widow attempted to vote the stock and otherwise exercise the rights of ownership. Such are not the facts in this case. In the case at bar there is not even a scintilla of evidence that the respondent ever even knew that this stock had been transferred to her name.

Counsel also overlooked the fact that the Circuit Court of Appeals stated in its opinion that plaintiff's theory was that the attempt to hold the respondent liable was based upon her actual ownership of the stock.

Petitioner also fails to point out that the receiver gave a receipt and release of this obligation to the administratrix of the estate of Arthur B. Williamson covering the same stock which the receiver and his successor had already determined was the property of that estate. This receipt and release is set out in full in our statement of the case. This release was given after the receiver of the defunct bank had filed his claim in the estate proceedings in the state court and it had been allowed (R. p. 17).

The allowance or rejection of a claim against an estate operates as an adjudication and is binding on claimant.

City of LaPorte v. *Organ*, 5 Ind. App. 369, 32 N. E. 342.

Where a receiver has made his election to hold the trustee of an estate on the ground of a bona fide transfer, he would not be permitted to recover from the settlor of the trust on the theory that there was no valid transfer.

Pottorff v. *Dean*, 77 Fed. (2d) 893, 896.

The theory of the case at bar as shown by the complaint is that the defendant here was the record owner of 14¼ shares of stock (R. p. 2, Clause 5). The theory of the claim likewise is that Arthur B. Williamson was the record owner of the same 14¼ shares of stock (R. pp. 70, 71). The allowance of the claim establishes that Arthur B. Williamson, or the estate of Arthur B. Williamson, was the owner of this stock, and we respectfully submit that under the cases cited the plaintiff was not entitled to recover by this showing.

Likewise the receipt and release of the receiver is a complete bar.

Receivers have the right to effectuate settlements of assessment liabilities against owners of bank stock. 12 U. S. C. A. 67. This was done in this case (R. p. 68).

In the case of *R. H. Stearns Co.* v. *United States*, 291 U. S. 54, 63, 78 L. Ed. 647, 655, the Supreme Court held *"Acts done by a public official which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter"*.

In the case of *Baird* v. *Smith*, 7 Cal. App. (2nd) 597, 46 Pac. (2nd) 830, 831, the court stated:

> "It will not be presumed that the receiver, a public officer, exceeded his authority and that he compromised the claim of the bank against defendant wrongfully, or in violation of his legal duties. It will be presumed, therefore, that defendant's debt to the bank was one which the receiver could rightfully settle without exacting payment in money."

There is no evidence in the record that any statutory requirement was omitted.

Conclusion.

We respectfully submit the Petition for Certiorari should be denied for each of the following reasons:

1. There is no substantial question involved.

2. The case of *Williams* v. *Vreeland*, 250 U. S. 295, fully substantiates the action of the trial court and the Circuit Court of Appeals of the Seventh Circuit.

3. The opinion of the Circuit Court of Appeals is in no way contrary to or out of harmony with any ruling precedent or any principle of law declared by this Court or any other Circuit Court of Appeals.

We respectfully submit that the petition should be denied.

Respectfully submitted,

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